RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

HORACE AUSTIN AND OTHERS v. THE RUTLAND RAILROAD COMPANY AND OTHERS.

A tenant in common wrongfully excluded by his co-tenant from possession of the common property may ordinarily maintain ejectment for his interest.

One moiety of land was held by a railroad company in fee and the other moiety by a tenant for life. The railroad company acquired the life estate and then built its road over the land. After the expiration of the life estate the remainder-man brought ejectment to recover possession of the land jointly with the company. *Held*, that the action would not lie.

The building of the road by the company while it had the exclusive right of possession was a lawful use of its own property and could not be changed into an unlawful ouster of the plaintiff by his subsequently accrued right of joint possession. The circumstances of such a case take it out of the ordinary rule, and the plaintiff is remitted to his statutory remedy for damages.

The lot was on the shore of Lake Champlain. During the time of the railroad company's exclusive possession it built a wharf out into the lake beyond low-water mark. *Held*, that plaintiffs had no right or interest in this wharf, and it must be excluded in assessing the value of their estate in the lot.

The owner of land in Vermont bordering on Lake Champlain has no title below low-water mark except by statute, which gives him the right to build a wharf or dock in front of his land. Therefore this wharf was not a building on plaintiff's land, nor an accretion to it in the legal sense; it was a mere abutting against it by a structure built outside of it.

THIS was an action of ejectment. The facts are stated in the opinion.

W. G. Snaw and *E. J. Phelps*, for plaintiff, cited *McAuley* v. *Western Vt. R. R. Co.*, 33 Vt. 311; *Knapp* v. *McAuley*, 39 Vt. 275; *Blundell* v. *Catterall*, 7 E. C. L. 152; *East Haven* v. *Hemingway*, 7 Conn. 186; 9 Conn. 37; 20 Conn. 117; 32 Conn. 501; 1 Black 23; 7 Wallace 289; 10 Wallace 504; 29 Ind. 364; 5 Sanf. 48; 15 Conn. 136; 1 Wash. Real Prop. 437.

Daniel Roberts, for defendants, cited 28 Vt. 257; Doug. Rep. 441; 19 N. Y. 523; 6 N. Y. 522; 8 Cow. 146; Law Reporter, March 1871, p. 165; 15 Gray 1; 25 Conn. 352.

The opinion of the court was delivered by

BARRETT, J.—The plaintiffs have brought ejectment for the recovery of possession of the premises in question, upon their title to an estate in remainder under the will of their grandfather, who

died in 1810. By his will he gave a life estate in water-lot No. 10, in Burlington, to his two daughters, Avis and Nelly, in equal undivided moieties, remainder to the heirs of each in the same moieties in fee. The plaintiffs are the children of Nelly, she having died in January 1870. Many years ago the title and right of Avis and her children became vested in the defendants, as also did the life estate of said Nelly; and they held the exclusive possession of the property under such acquired title and right. On the decease of said Nelly Austin her children, the plaintiffs, succeeded in remainder to their rights as owners in common with the defendants of an undivided moiety of said lot No. 10. Prior to this event, and while the defendants were holding the exclusive possession of said lot, their railroad was duly located upon it, and the whole of it was thus appropriated, and has ever since been held and used, and still continues to be held and used, for the ordinary, necessary and legitimate purposes of the railroad. The plaintiffs have thereby been excluded from the possession, occupancy and use thereof. There has been no appraisal or payment of land-damages, as provided by the statute laws of this state, nor in any other way. The plaintiffs, after due demand of possession, and refusal by the defendants, brought this action.

The question is, are they entitled to maintain it? It is conceded that the defendants were rightfully in the exclusive possession till the termination of the life estate of said Nelly, as aforesaid, in 1870, and that, during such possession, "they might do what they pleased with the land, provided they committed no waste." Being in possession with such title and right, it was legitimate for them to locate and make the railroad as was done, and to continue it, without payment of damages to anybody, up to the time that plaintiffs could assert a right in themselves, as against the defendants. It was incident to the tenure of the defendants, as well as to the title and estate of the plaintiffs, that the railroad might be located, made and used, without payment of damages to the plaintiffs, during the period of the defendant's right to exclusive possession in virtue of such tenure. There was no life-tenant to be regarded. There was no remainder-man to be regarded, till such remainder-man's right to claim possession was available to him. We think, then, that all the reasons for what was held in the cases of *McAuley v. Railroad Company* in 33 and 39 Vt., and in *Troy and Bos. R. R. Co.* v. *Potter*, 42 Vt. 272, apply with unabated force in the present case.

Saying nothing as to the matter of knowledge and implied assent on the part of some of the plaintiffs, upon which a point was made in the argument, it would seem that when the defendants, in the exercise of their lawful right as against these plaintiffs, have located and made their road on the lot in question, they should no more be subjected to being ousted, or to having the plaintiffs let into co-possession, than in case the plaintiffs had been absolute owners of the whole lot throughout, and had assented to the doing of the same, without having the damages first appraised and paid.

In the cases referred to above, the point of the reason against permitting the landowner to eject the corporation, or to be let into possession, joint or otherwise, is, that the corporation had done a lawful act in locating and making the road through the land in question, without first having the damages appraised and paid. In those cases the lawfulness of the act resulted from the consent of the landowner. In the case before us, the act was equally lawful, it having been done by the party lawfully in exclusive possession, and who might lawfully do it in virtue of its title and estate in the premises. This being so, we think it would contravene both the reasons and the rules that have had operation and force on this subject, now to hold that the lately accrued right to the plaintiffs, of availing themselves of their estate in the premises, changes what the defendants have done in locating, making and maintaining their railroad into a wrong as against these plaintiffs, and the exclusion of them from a co-occupancy, into such an unlawful ouster as will entitle them to maintain this action.

On the other hand, the provisions of our statutes seem plainly to indicate the legislative sense of the state to be in harmony with the judicial sense, as manifested in the decided cases involving the subject.

Sect. 17, Ch. 28, Gen. Stat., which makes provision for the appraisal of land damages in case the parties do not agree about them, contemplates that, in some cases, land may be taken and damage thereby sustained before appraisal shall have been made, and it contains provisions for the appraisal and payment of damages in such cases, as well as in others. In this connection it should be remarked, that the provisions of the statute for the appraisal of damages before the said road can lawfully be made, do not seem to contemplate, or to be adapted to a case like the present. It does not fall within the terms or the meaning of sect. 20 of that

chapter, which is applicable only to cases in which damage to right of dower, or estate for life or years, is to be appraised, in which cases the damage to the reversionary interest may also be appraised.

Here was no estate for life to be damaged, for it was in the defendants; and so it was not a case for appraising damages to the interest in remainder. Indeed, the inapplicability to this case of the other incidental details, in the provisions for the appraisal of land damages before the making of the road, enforce the idea that cases like the present were not intended to be subject to those provisions.

When we turn to section 26 of the same chapter, it is seen to be full and explicit in provisions for such cases, thus: "In every case where a railroad company have entered upon, taken possession of, and used land and real estate for the construction and accommodation of their railroad * * * and shall not have paid the owner therefor, nor, within two years from such entry, had the damages appraised, &c., the ordinary courts of law shall have jurisdiction thereof, to wit: justices of the peace, &c., and the county court, &c., and any person claiming damages may bring suit therefor, in the usual form, &c., and shall recover only actual damages."

This seems to contemplate that the company might have two years after such entry, taking possession and using, in which to get such damages appraised pursuant to the provisions of sec. 17. It seems difficult to suppose that it was contemplated at the same time, that in the mean time they should be liable to be ousted by action of ejectment. We think that the alternative remedy provided in section 26 clearly indicates that, after the lapse of said two years, without such appraisal having been made, not by ousting the company by action of ejectment, but by suit for damages, the landowner is to get what he would have realized as the fruit of the proceeding provided in section 17.

These provisions of the statute seem to recognise the peculiar character of the subject-matter, much as the courts have recognised and regarded it, in our own and in other states. A most marked instance of such recognition is the case of *Sturgis* v. *Miller*, 31 Vt. 1. The same is true of the other cases above referred to.

We concur, then, in holding that, in the case as it is now before us, the plaintiffs are not entitled to have a judgment, giving them co-possession with the defendants of the land in question. In the views thus presented, we design to propound only the law of the present case, leaving cases made up of other elements, and charac-

terized by different features, to abide such consideration as may seem meet when they shall be before the court for adjudication.

In holding as we do in this case, we are not unmindful that a party, in ordinary cases, unaffected by peculiar statutory provisions, would be entitled to maintain ejectment against his co-tenant, when wrongfully excluded from the possession of the common property by such co-tenant.

We put this decision on the ground, as above indicated, that the subject-matter (when regarded with reference to the law ordinarily governing the action of ejectment in its origin and development) is extraordinary and peculiar—that the property was lawfully put to its present use by the defendants, as against these plaintiffs—that special statutory provision is made for ample remedy in such a case, and, having reference to the public interests involved in, and affected by, the construction and operation of railroads; and, in view of what has been held in other cases standing upon the same reasons, it is fairly to be assumed that such statutory provision for remedy was intended to supersede the common remedy by action of ejectment, which is available in ordinary cases between tenants in common.

We have not deemed it advisable to enter upon a discussion of the question, whether the plaintiffs would have a lien for the damages recovered by them under said section 26, as our attention was not called to it in the argument, except by a passage in the brief for defendants—that "plaintiffs' right to full damages are reserved to them by a specific *lien* on the lands," citing said sections 17 and 26, Gen. St. ch. 28. Of course, aside from such resource, they would have all the rights of any judgment-creditor for enforcing judgment against a judgment-debtor.

II. The case presents another and distinct feature, viz.: within the period of the defendants' exclusive possession of said lot, the defendants, in the construction of said railroad, and for the laying of necessary tracks, had filled in with earth a distance of 110 feet into the lake, beyond the original water-boundary of said lot, and had built a dock extending still further into the lake.

It is claimed for the plaintiffs, that said made land and dock are embraced within the estate which they own under said will of their grandfather. The township of Burlington, in the original location and survey, was bounded west "on the shore of Lake Champlain." The lot, in its original location and survey, and as it was described

in the proprietor's records, contained twenty rods of land, bounded on the north by the south line of South street, east by the west line of Water street; being fifty links in width on said Water street, and bounded "west by the waters of Lake Champlain." In the year 1800 that lot, thus bounded, became the property of said testator. It remained unchanged in that respect, and in the condition of its water-front, during the life of the testator, and up to the time when the defendants made said additions of land into the water of the lake. Neither the testator, nor any one under him, made any erections or structures on the water-front, in the character of pier, dock, wharf or storehouse. So nothing had been done in the nature of asserting or exercising any right in those respects, as appertaining to that lot, in reference to the lakes for any purpose. The testator enclosed and occupied during his life only the east half of said lot; defendant's counsel understand that lot No. 10 extended to low-water mark, and that the estate of the plaintiffs extends to the same line. The right of the plaintiffs is thus conceded to the utmost limit of title and ownership in the soil known to the law, as shown by the text-books and decided cases, whether in the nature of a corporeal or incorporeal hereditament. All that can be claimed for the plaintiffs, as the ground of their alleged title and interest in the made land, is the right that the owner of said lot, as it originally was, had to pass to and from the waters of the lake within the width of the lot, as it bordered on and was washed by said waters. It is not denied that the lake is "navigable water," in the sense of the law governing public and private rights in respect thereto. There is no occasion therefore to discuss or decide whether the common law of England, or of Massachusetts, or of Connecticut, or of any other state, is the common law of Vermont as to such rights. We remark, however, that there is no *common law* of Vermont, by which the owner of land bounded on Lake Champlain has a right, beyond low-water mark, to appropriate as his own the bed of the lake. Neither the legislature nor the courts have recognised any such right except as it has been conferred by act of legislation. And the whole course of legislation on the subject indicates that there was no such right by any kind of common law in this state: see Act of 1802, granting to the Burlington Bay Wharf Co. the privilege of erecting and continuing a wharf. Also the Act of 1825, giving the right to Messrs. Keyes to extend a wharf into the lake from

low-water mark. Also Acts No. 41 and No. 42, in 1826, of a similar character.

The matter had thus proceeded up to 1839, when, in the revised statutes of that year, sect. 7, ch. 59, it was enacted, that: "All persons who may have erected any wharves, &c., *agreeably to the provisions of any grant heretofore made*, or agreeably to the provisions of this chapter, their heirs and assigns, shall have the exclusive right to the use, benefit and control of such wharves, &c., for ever." This seems plainly to show the idea of the legislature to have been, that the right to build a wharf or other structure beyond the land of the riparian owner, into the water of the lake, depended on a legislative grant, either shown or presumed. And the same is clearly shown by the preceding sec. 5., viz.: "Any person owning lands, adjoining Lake Champlain, may erect any wharf or store-house, and extend the same *from the land of such person* in a direct course into Lake Champlain * * * between the lands of such person and the channel of the lake." This contemplates that the right to build into the lake "from the land," &c., is given by that provision of the statute.

There is no ground for claiming that those general legislative enactments were only in affirmance of already existing common law of the state; for, not only does the fact of such legislation, and the terms and provisions of it, discountenance such claim, but the special legislation that had preceded it, and which is emphatically recognised in said sec. 7, ch. 59, Rev. St., is altogether inconsistent with it. The right, then, that existed in the testator, as owner of lot No. 10, was not a right appurtenant to the lot to build into the lake in front of it. He had only, and at most, so far at the lake was concerned, a right in common with all other persons, to use the waters of the lake in any proper way, and for any proper purpose. As the absolute owner of said lot, he had the exclusive right to use it in passing to and from the lake. But this gave him no peculiar or additional right as to the lake itself. Of course it could not give him title to erections or structures made by others beyond the limits of his own land. If, in making such erections and structures, others should violate any right of his, as owner of the land to low-water mark, he could seek redress in some proper way, but not by action based on his right as the owner of them. If they should be a nuisance, in the legal sense, the abatement of them might be invoked by a proceeding proper for that purpose. The doctrines of the law as applicable to this feature of

the case are well developed and applied in *Gould* v. *Hud. Riv. R. R. Co.*, 2 Seld. (6 N. Y.) 522, and in *Prest. &c. Harv. Col.* v. *Stearns*, 15 Gray 1; also in *Patt. & Newark R. R. Co.* v. *Stevens*, 10 Am. Law Reg. N. S. 165.

In those cases the learning of the subject is so amply embodied, analyzed and applied, that little would be gained by repeating what has been done by the learned courts in the decisions referred to. The case of *Nichols* v. *Lewis*, 15 Conn. 136, is not at odds with the views which we hold in the case in hand. In that case it was held that the plaintiff owned a tangible property between high and low water-mark where the tide ebbed and flowed, of which he was entitled to the possession as against the defendant, by whom he had been ousted, and that he could recover by ejectment the possession of the *locum in quo*, notwithstanding the defendant had made on it a dump or fill of earth—so far as the dump was concerned, it being put on the same ground, "as if a man builds on another's land, the building belongs to the owner of the land."

The kind of estate which, in Connecticut, a riparian owner on navigable water, like the plaintiff in that case, has in the shore, is indicated by Ch. J. HOSMER, 7 Conn. 202, in commenting on a passage in *Swift's System*. He says: "By this expression I do not understand that the proprietors alluded to were *seised*, but they had a right of occupation, properly termed a franchise." Those cases were very different from this. Here was no building *upon* the plaintiff's land—only an abutting against it by a structure made outside of it. It is not a case of accretion or gradual reliction, which belongs to the riparian owner. It does not fall within the right *usque ad cœlum*, for that of itself does not often extend more widely than the *solum* of the owner, on which such rights must be grounded. Most of the other cases cited by plaintiff's counsel arose with reference to the right to appropriate and use the *shore*—the space between high and low water-mark—where the tide ebbs and flows. As to rights beyond low-water mark, they countenance and maintain our views in this case. In *Blundell* v. *Catterall*, 7 E. C. L. 152, it is shown that the exclusive right in the plaintiff to the shore of the navigable water in question did not exist, except by grant from the Crown. In that case the learning on the subject of riparian rights along navigable waters is exhaustively developed by discussion and citation, and entirely in consonance with the present decision.

We have examined the cases cited in the U. S. Supreme Court Reports, and find that none of them maintain a right of soil in the plaintiffs beyond low-water mark. And that must be maintained, in order to entitle them to recover in ejectment the made land in question. The case of *Dutton et al.* v. *Strong et al.*, 1 Black 23, most confidently urged upon our attention by counsel for plaintiffs, countenances precisely what we hold as to rights beyond low-water mark. We cite some passages of the opinion by CLIFFORD, J., p. 31, "Bridge-piers and landing-places, &c., are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, &c., as well as on the lakes; and, where they conform to the regulations of the state, and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation." * * "Our ancestors, when they immigrated here, undoubtedly brought the common law with them; * * but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject, and, in some, the right of the riparian proprietor rests upon immemorial local usage. * * * Wherever the water of the shore (of the lake) is too shoal to be navigable, there is the same necessity for such erections, as in bays and arms of the sea; and, where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases." The question in that case was, whether the defendants, who had built such a pier on the shore of Lake Michigan, had such a property right in it as to entitle them to prevent the plaintiffs from causing its destruction, by hitching their vessel to it in stress of weather, a very different question from that of right of soil in land made by another outside of the testator's water front of low-water mark into the body of the lake. The other cases cited need no comment, for it is not claimed that they are more in point than those noticed above.

According to these views the judgment is reversed, and cause remanded.

The foregoing opinion presents questions of new impression, growing out of the law of railways. The remedy by ejectment seems to be denied upon two grounds, either of which would be sufficient in itself. 1. The fact that the

railway company had, in the first instance, rightfully applied the land to their exclusive use. 2. The fact that the general railway law of the state provided for assessing land damages where the company had appropriated the land without such assessment; and which, as embracing the present case, might properly be held exclusive of all other remedies, with the further provision in the same statute, that where railway companies had appropriated land to their use, and had omitted to have the damages appraised until the term allowed for such appraisal had expired, the owner of such land might have his common-law action against the company for the value of the land so appropriated. This provision of the statute seems to afford ample remedy for all damage which the plaintiffs claim to have sustained in this case; and as statutory remedies, in such cases, have always been held exclusive of all others, we do not see why this will not effectually dispose of the case. And it seems to us an eminently just and reasonable disposition of such a case, and the construction of the statute a very suitable one, since if the statute were not originally made to embrace precisely this class of cases, none such having then occurred; still its terms being broad enough to reach this class of cases, and there being the same reason to apply the rule to them as to any other, it evidently comes fairly and fully within the legitimate scope of the statute, both in its terms and presumptive spirit and intent. The construction is therefore entirely lawful. It is also commendable, inasmuch as it reaches the evident purpose of the statute, without resort to emendatory legislation in order to remove doubts resulting oftener from the speculations of the court than from the terms used as applied to the subject-matter.

It seems to us this view is rather more satisfactory than that which treats the case as coming within the principle of the other cases referred to, where the company have built their road upon the land by the consent of the owner without having the damages assessed or agreed upon by the parties. There is no doubt a very obvious resemblance in the equity of the two classes of cases, and a court of equity would probably feel compelled to deal with them in the same way. But there seems more question in regard to the strict legal rights of the parties, which is not probably very important, except as determining which party shall take the initiative in going into equity. It is rather difficult for us to see clearly wherein the plaintiffs have been in fault in having their land applied to the use of the railway, or precisely how it can be clearly shown that the defendants have rightfully applied the plaintiffs' land to their own exclusive use. No doubt the defendants might rightfully do what they did, at the time of doing it; but this they did as the owners of the life-interest, and with the full knowledge of the outstanding title in the plaintiffs. And we might find some difficulty in saying, that the mere fact that there was here no life-estate to be taken for the use of the railway, presented any insurmountable obstacle in the way of having the plaintiffs' interest in a vested remainder condemned for the use of the railway. We should certainly find difficulty in reaching any such conclusion unless the phraseology of the statute clearly necessitated such a construction. Upon general principles of construction it would therefore be more natural to treat the defendants as primarily in fault in appropriating the plaintiffs' estate in remainder to the exclusive use of their railway, without first obtaining the title either by condemnation or voluntary purchase. But this is all matter of construction, and the opinion of the court in regard to the force and

import of the statute is final. We may therefore conclude, with the court, that the defendants, under the statutes of the state, had no power to take the plaintiffs' interest in the land until after the determination of the life-estate, inasmuch as having already obtained the latter, there could be no proceeding to condemn it, and consequently none to condemn the estate in remainder. In this view of the case the defendants did all in their power to do, in order to obtain the title of the plaintiffs, until their title in possession accrued. This construction seems a very equitable one, and surely a very convenient one for bringing about the desired result, viz., allowing the defendants to retain the land upon paying its value. For if the court had adopted the construction of the statute which we have before indicated as the more natural upon general principles of construction, there might have been more difficulty, upon the decided cases, in compelling the plaintiffs to relinquish their title upon the payment of its fair value. A court of equity might have so dealt with the matter—we certainly believe they should have done so. But the court here, with great ingenuity and equal propriety and justice, as it seems to us, find the provisions of the general statutes precisely accommodated to the peculiar exigencies of this case.

If the view which we have suggested, as a plausible one upon general principles, had been adopted by the court, and judgment been given in the ejectment to let in the plaintiffs to the enjoyment of their share of the common property, they might possibly, upon strictly legal principles, have found themselves in a somewhat embarrassing predicament. For by recognising the defendants as tenants in common, and only in the proper use and management of the estate, they would possibly become tenants in common of the railway, since it would be impossible to separate the particular portion of it resting upon this land from the entire work. If the law for the severance and destruction of the common title between tenants in common were the same in regard to real estate as it is with reference to personalty, we might find some mode of escape from the embarrassment in treating the defendants' use of the land as a destruction of the common property, which would leave the plaintiffs no redress except to recover the value. Thus in regard to personalty, where one tenant converts the common property into something else, as by mixing shot-iron with other iron, and manufacturing the mixture into various wares, rendering it impossible to trace the identity, and then selling the wares, it will amount to a conversion, and the proper remedy will be to recover the value of the tenant's interest: *Redington* v. *Chase*, 44 N. H. 36. So also in many of the more recent cases, especially in this country, where one tenant in common of personalty assumes to sell the whole, it has been held a conversion, giving the other joint owners a remedy in damages only: *White* v. *Brooks*, 43 N. H. 402; *Tyler* v. *Taylor*, 8 Barb. 585; *Wheeler* v. *Wheeler*, 33 Me. 347; *Weld* v. *Oliver*, 21 Pick. 559. The early cases did not recognise the mere sale or disposition of the common property as amounting to a destruction of the interest of the other tenants, but as leaving them to hold in common with the purchaser: *Holliday* v. *Camsell*, 1 T. R. 658; *Tubbs* v. *Richardson*, 6 Vt. 442; *Heath* v. *Hubbard*, 4 East 110; *Fellows* v. *Lord Greenville*, 1 Taunt. 241; *Oviatt* v. *Sage*, 7 Conn. 95.

But no such rule has ever been attempted to be applied to real estate held by tenants in common. The tenant in possession is presumed to hold for the joint use of all the tenants, until he gives unequivocal notice to the contrary, which will amount to such an ouster, as to enable them to recover in ejectment to be let into joint possession: *Denys* v.

Shuckburgh, 4 Y. & C. 42. An ouster may indeed be presumed after a very long holding by one tenant, no claim being made by the others. This was presumed after thirty-six years, it being left to the jury to presume an ouster more than twenty years before suit brought, and thus quiet the title in the one so long in possession: *Doe* v. *Prosser*, 1 Cowp. 217. So too one tenant in common may have an action for waste against the one in possession: Co. Litt. 200 b. So also he may have an action of account: Co Litt. 172 a, 186 a, 200; F. N. B. 118. But an action of ejectment will not lie for cutting trees of a proper age and growth: *Martyn* v. *Knowllys*, 8 T. R. 145; Petersdorff's Abr. tit. *Tenants in Common*. And even where the Statute of Limitations has run against some of the tenants, those whose rights are saved by disability will be let in as tenants to those holding adversely: *McFarland's Adm'r.* v. *Stone*, 17 Vt. 165. So that it would be difficult to drive the plaintiff to an action for the value of his estate, on the ground that the tenant in possession had destroyed the estate by putting it to the use of a railway.

The second point in the opinion seems sufficiently disposed of by driving the plaintiff to his action under the statute for the value of his estate, on the ground that the tenant in possession had effectually and permanently deprived him of its use by applying it rightfully to the use of a railway. He could scarcely expect to recover the enhanced value caused by the railway after its appropriation to that use. And the argument of the court seems entirely satisfactory to show that the filling into the lake below the low-water mark, under statutory provisions, is, in no sense, an erection upon the land in question, or in any way creating an accession to the land, so as to enable the plaintiffs to recover damages on account of it.

We must therefore conclude, in all seriousness, that the opinion presents a most satisfactory disposition of an action, making rather exorbitant demands under the color of law, and raising some rather embarrassing questions on the strict principles of the common law. We are bound to say also that we always rejoice to see such results reached, since we regard it as the duty of courts to so apply the law as to make it reach the justice of the case, if at all possible, without too great departure from established principles. We should not feel much surprised to find the plaintiffs somewhat indignant to have their expected gains brought to so disastrous a fate by means of constructions, which to them will naturally appear more nice than wise. We hope they will not attempt to console themselves by any rash comparison of the decision with a somewhat celebrated MS. case, in the early practice of the distinguished senator from that state, Hon. Stephen Roe Bradley, with whom the eminent counsellor the late Jeremiah Mason read law. I. F. R.

Supreme Judicial Court of Maine.

ELLIS *v.* BUZZELL.

In actions of slander, where the words charged impute crime, and the defendant pleads the truth in justification, he must prove the actual offence charged—that is he must prove the *same matters or facts* that would be requisite to convict the plaintiff on trial upon indictment for the crime.

But it is not necessary to prove the facts to the exclusion of all reasonable doubt